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Senate

Statement of Senator Dianne Feinstein

"On the Class Action Fairness Act"

Mr. President, I wish to speak in favor of the bill, but I also wish to say that I very much hope some accommodation can be reached so this bill can come to a vote. It is an important bill. It is a bill that deals with a very real problem, and I would like to challenge every Member of this august body to read this bill. I have read it twice. It is easily understood. It is in very plain English. It essentially provides a guide to consumers as to the protocols and regulations that govern what has been a murky area of class action lawsuits. It is legislation that is long overdue.

I very much appreciate the position of my leader, Senator Daschle, in wanting to protect our minority rights, in wanting to have an opportunity to

have a debate on bills that Members on this side think are extraordinarily important, as do Members on the other side. In the past, a fair way has been found, so I hope that will be the case.

As I said, I believe the way class actions are conducted is, in fact, a real problem. I have spent a considerable amount of time on the issue through Judiciary hearings, many personal meetings with those on both sides of the issues, plaintiffs and defendants, and a lot of time and energy on research and analysis. I eventually came to the conclusion that the supporters of this bill have clearly identified this problem and have come up with a reasoned solution.

More than identifying the problem, the supporters of

this bill -- Senator Kohl, Senator Grassley, Senator Carper, and others -- have worked diligently over the course of the last few years to answer criticisms and concerns, to address real issues, and even to make significant changes in the original legislation, changes that made this bill better at every single turn. The bill before us, then, is the result of many changes and compromises, both in the Judiciary Committee and more recently changes made after further negotiations with Senator Schumer and others pending floor action. Simply put, the legislation in its current form is more moderate, more reasoned, and will be more effective than past versions of the bill.

I thank Senators Hatch, Grassley, and Kohl for so

diligently working with me and others throughout this process to correct a number of potential problems or areas of confusion that were within the original bill. I know they have many forces pulling on them from all sides, and I appreciate the time they spent in addressing these concerns.

Let me talk a little bit about the legislation and what it does and how I became involved in it. I will never forget a hearing before the Senate Judiciary Committee 2 years ago. At that hearing, we heard from a woman by the name of Hilda Bankston. She owned a small pharmacy with her late husband, in Mississippi. Since that time, Mrs. Bankston sent a letter to us, and she summed up her testimony before the committee. I want to read it to you.

“My name is Hilda Bankston and I live in Fayette, Mississippi. I am a former small business owner who was victimized by lawyers looking to strike it rich in Jefferson County and I write to you

today to tell you that our legal system is broken and that the Class Action Fairness Act will help fix it.”

Over the next few days, et cetera, et cetera, we will be debating this legislation. This is the important part, this is what she said in committee, and this is the overarching need to stop forum shopping:

“For thirty years, my husband, Navy Seaman Fourth Class Mitchell Bankston, and I lived our dream, owning and operating Bankston Drugstore in Fayette, Mississippi. We worked hard and my husband built a solid reputation as a caring, honest pharmacist.

“But our world and our dreams were shaken to their foundation in 1999, when Bankston Drugstore was named as a defendant in a national class action lawsuit brought in Jefferson County against one of the nation’s largest drug companies, the manufacturer of Fen-Phen, an FDA-approved drug for weight loss.”

Here is where it gets difficult, and now I am speaking, not quoting Mrs. Bankston. Fen-Phen certainly had problems. The reason for litigation can be very clear. However, the rationale for forum shopping and, more importantly, how forum shopping is conducted, is what this letter and what Hilda Bankston’s story is all about.

Though Mississippi law does not allow for class action lawsuits, it does allow for consolidation of lawsuits or mass actions as long as the case involves a plaintiff or defendant from Mississippi.

Here it is:

“Since ours was the only drugstore in Jefferson County and had filled a prescription for Fen-Phen, a drug whose manufacturer is headquartered in New Jersey, the plaintiffs’ attorney named us in their lawsuits so they could keep the case in a place already known for its lawsuit-friendly environment. They could use our records

as a virtual database of potential clients.”

So not only was she not involved, they just happened to fill a prescription and they became a source for litigation.

“Mitch had always taken the utmost care and caution with his patients. As the Fen-Phen case drew more attention, he became increasingly concerned about what our customers would think. His integrity, honor, and reputation were on the line. Overnight, our life’s work had gone from serving the public’s health to becoming a means to an end for some trial lawyers to cash in on lucrative class action lawsuits.

“Three weeks after being named in the lawsuit, Mitch, who was 58 years old and in good health, died suddenly of a massive heart attack. In the midst of my grief, I was called to testify in the first Fen-Phen trial.

“I sold the pharmacy in 2000, but have spent many years since retrieving

records for plaintiffs and getting dragged into court again and again to testify in hundreds of national lawsuits brought in Jefferson County against the pharmacy and out-of-state manufacturers of other drugs. Class action attorneys have caused me to spend countless hours retrieving information for potential plaintiffs. I have searched record after record and made copy after copy for use against me. At times, the bookwork has been so extensive that I have lost track of the specific cases. I had to hire personnel to watch the store while I was dragged into court on numerous occasions to testify. I endured the whispers and questions of my customers and neighbors wondering what we did to end up in court so often. And I spent many sleepless nights wondering if my business would survive the tidal wave of lawsuits cresting over it. Today, even though I know longer even own the drugstore, I still get named as a defendant time and again.

“This lawsuit frenzy has hurt my family and my community. Businesses will no longer locate in Jefferson County because of fear of litigation. The county’s reputation has driven liability insurance rates through the roof.

“No small business should have to endure the nightmares I have experienced. I’m not a lawyer, but to me, something is wrong with our legal system when innocent bystanders are little more than pawns for lawyers seeking to win the ‘jackpot’ in Jefferson County -- or any other county in the United States where lawsuits are ‘big business.’”

This is really the point. I heard the distinguished Senator from Illinois make a very important point about the different kinds of cases that are involved. But what we are talking about is forum shopping. It is specifically setting up a class action to be able to get that case into a specific place, a friendly county.

The Bankstons were actually sued more than 100 times for doing nothing other than filling legal prescriptions. The pharmacy had done nothing wrong. They were the only drugstore in the county, a county that was so plaintiff friendly, I am told, that there are actually more plaintiffs than residents.

Because of the arcane and problematic rules now governing class actions in U.S. courts, the plaintiffs' lawyers shopping for a friendly court just needed to name a local business in order to file their national lawsuit in that county. That is all it took. Before they knew it, the Bankstons were defendants in dozens of essentially frivolous suits against their small pharmacy.

This was a family torn apart by litigation. I use this case because, of all the hearings that have been held in the Judiciary Committee in 12 years, this woman made a profound impression on me as I sat there hour after hour and listened to the testimony.

Let me hasten to say that this abuse comes from just some class action lawyers - not all of them but some - who forum shop national class action lawsuits and file them in States and counties where they know the court will approve settlements favorable to them without concern for class members.

What does this bill do? The amended Class Action Fairness Act goes a long way toward stopping forum shopping by allowing Federal courts to hear national class action lawsuits that involve plaintiffs and defendants from different States and which involve more than 5 million in claims. I think the original bill was 2 million. We amended it in committee to make it even bigger so we could be sure as to the kinds of cases that would be affected.

The Framers of the Constitution wanted Federal courts to settle disputes between citizens of different States. They wanted Federal courts to settle disputes between different citizens of

different States. The Constitution itself states that the Federal judicial power "shall extend...to controversies between citizens of different States."

Historically, this meant that when one person sues another person who lives in another State, or sues a company headquartered in another State, the suit can be moved to Federal court with some limitations.

Class actions involve more citizens in more States, more money, and more interstate commerce ramifications than any other type of civil litigation. It only stands to reason that many of these cases should be heard in Federal courts. Yet an anomaly in our current law has resulted in a disparity wherein class actions are treated differently than regular cases and often stay in State court. The current rules of procedure have not kept up with the times, and the result is a broken system that has strayed far from the Framers' intent.

This bill does a number of things. First, the bill contains a “consumer class action bill of rights” -- and it is important, and you will really see it is understandable -- to provide greater information and greater oversight of settlements that might unfairly benefit attorneys at the expense of truly injured parties.

Let me give you some examples. The bill ensures that judges review the fairness of proposed settlements if those settlements provide only coupons to the plaintiffs. What is wrong with that? Coupons are a real problem. They are a way by which a plaintiff actually receives very little or something that is very difficult to recover.

Second, it bans settlements that actually impose net costs on class members. I could read letters from individuals where they actually came out the losers in these suits.

Third, it requires that all settlements be written in plain English so all class

members can understand their rights. How can anybody fault that? Write it so people who read them can understand what they say.

The bill also provides that State attorneys general can review settlements involving plaintiffs from their States so the consumers get an extra level of protection from someone elected to serve -- not just plaintiffs’ attorneys who may be trying to get the best settlement for their own interests.

Second, and of greater impact, the legislation creates a new set of rules for when a class action may be “removed” to Federal court.

These new rules are diversity requirements modified in committee and again since then make it clear that cases which are truly national in scope should be removed to Federal court. But equally important, the rules preserve truly State actions so those confined to one State remain in State courts.

Since I have offered this amendment in committee, the so-called diversity amendment, I believe it made it much better, more narrowly tailored. I think my amendment went right to the heart of the bill and its purpose. So I would like to spend a few minutes to talk about these amendments, how it changed the original bill and the ways in which I believe it is more clear, more fair, and more workable.

I offered one amendment, cosponsored by Senators Hatch, Kohl, and Grassley, that was meant to do two things. First, it simplifies the diversity jurisdiction section of the bill. Second, it narrows the scope of the bill by reducing the number of cases that automatically go to Federal court. This will allow Federal courts to focus on the cases that are truly national in scope rather than cases that really belong in State courts.

This amendment only addressed the jurisdiction issues. It did nothing to change the rest of the bill

which contains very important protections for consumers, and it makes the whole settlement process much more fair. Let me explain it.

The original class action bill essentially moved all class actions of a certain size -- I think more than 2 million -- to Federal court unless "a substantial majority of the members of the proposed class and the primary defendants are citizens of the State in which the action was originally filed."

The case will be governed primarily by the laws of that State.

The original bill says that all class actions where a substantial majority of the members of the class and the defendants are citizens of the State would be moved to the Federal court.

We changed that. The standard was vague and it was prone to moving some truly State class actions into Federal court.

My amendment, which was accepted by the committee,

changed the law in this section to split the jurisdiction into thirds. Now there is less ambiguity about where a case will end up and more cases remain in State court.

Let me explain that. If more than two-thirds of the plaintiffs are from the same State as the primary defendant, the case automatically stays in State court -- it is clear; it is defined in the bill -- even if both parties ask for it to be removed to Federal court. It is very different from the original bill. If you have two-thirds of the plaintiffs and the defendant company in a State, the case stays in the State.

If fewer than one-third of the plaintiffs are from the same State as the primary defendant, the case may automatically be removed to Federal court.

Remember, this happens if one of the parties asks for removal. Otherwise, these cases, too, stay in State court. This may have escaped a lot of people. So even when there are fewer than one-third of the plaintiffs from the same

State as the primary defendant, the case remains in State court unless one of the parties asks to remove it.

Now, we are talking about the middle third in this diversity. We have a third, a third in the middle, a third on the end. In the middle third of cases, where between one-third and two-thirds of plaintiffs are from the same State as the primary defendant, the amendment would give the Federal judge discretion to accept removal or remand the case back to the State based on a number of factors. In determining whether one of these middle third cases would go to Federal or State court, the amendment directed the Federal judge to consider these facts:

First, the judge must examine whether the case represents primarily a State issue or whether it is of national impact. There are strong arguments to be made that State judges should not be making national law. This provision is meant to reach into that issue.

Second, the judge must consider whether the number of plaintiffs from the defendant's home State is much larger than the number of plaintiffs from any other State. In other words, there may be a case where 40 percent of the plaintiffs from California and no other State has more than a couple percent of the class. California law would apply. So even though the California plaintiffs do not make up an absolute majority of a class, they would clearly be the predominant portion of the class. If it is a State issue, such a case would remain in State court. The Federal judge would also look at whether the case was filed in State court simply because the plaintiffs are trying to game the system, perhaps by forum shopping for the best court, even when the case would better be tried elsewhere.

Finally, the judge is directed to look at whether this is the only class action likely to be filed on the same subject -- this is important -- or whether

there are likely to be others with the same facts at issue. This factor has been even further refined to provide that a judge need not consider whether similar class actions may be filed but only whether similar class actions have actually been filed in the last 3 years. So in order to avoid duplication, the judge would look at whether there were other like actions filed in the last 3 years.

Considering duplicative class actions is important because the Federal courts have a system in place to consolidate multidistrict litigation. It may therefore be better to have all duplicative class action cases move to Federal court simply to save time and make the process more efficient. If a case stays in State court it cannot be consolidated with similar cases out of State.

Therefore, we might end up with 50 State judges deciding 50 cases involving exactly the same defendant and exactly the same fact pattern. That does not make much sense. It is something that the judicial

conference has recommended we fix. And we do.

The amendment also raised the minimum amount of money that needs to be at issue before a class action can make it to Federal court. The original bill set that amount at \$2 million. My amendment raised it to \$5 million to further limit the number of cases that move to Federal court and to assure that it is only truly big national cases that do.

The effect of this amendment, I hope, will be to make the system more transparent so that plaintiffs and defendants know where a case will go when it is filed, and it will force truly State cases to stay in State court while allowing truly national cases to go to Federal court.

Under current law, an attorney can avoid Federal court simply by making sure that at least one plaintiff is from the same state as at least one defendant. This allows for cases to be shopped to

whatever forum may have the most sympathetic juries, no matter where the case should truly be heard. Under this modified bill, this forum shopping would be eliminated.

The second amendment I offered in committee, which was also accepted and has been only slightly modified, was designed to deal with a provision that was added to the original class action bill apparently to specifically target a California law. That law allows individuals in California to sue on behalf of the general public in lieu of the attorney general. Other States have or are considering similar legislation, but California is on the forefront of this issue, so it was California law, more than the law of any other State, that was targeted by this provision in the original bill.

The so-called private attorney general actions allow groups such as the Sierra Club, local district attorneys, government officials, or even individual consumers, to sue large corporations on behalf of

the people of the State. In California, these suits are generally to recover illegally gained profits or to enforce State law against companies that do business there. These are not true class actions. But the original bill essentially deemed these suits to be class actions and therefore would have moved many of them to Federal court even if all the plaintiffs were in California.

This was a real concern to me and to many in California who are concerned that these citizen suits would be so dramatically affected by a bill that was supposed to be about class actions, not private attorney general suits. So my amendment and subsequent clarifications of that amendment worked out between myself, Senators Hatch, Grassley, and Specter, simply clarify that in any case in which an individual pursues one of these private attorney general suits on behalf of members of the general public, or members of an organization, unless those suits are actually filed as

class actions, the bill does not apply. I want to make that clear.

So if, for instance, a California consumer sued Enron on behalf of the general public in an attempt to force Enron to disgorge ill-gotten profits and return this money to the Government of California, this bill would not change anything. The case would stay in California court.

I know there will probably be several amendments, and I have comments about some of those, but I would like to hold that until the amendments are actually presented.

Let me sum up and then yield the floor. Again, a simple reading of this bill is very demonstrative because it is easily understood. Unlike most bills, it is written in simple English. Probably the most complicated part is what I just went over, the diversity issue. One-third, one-third, one-third, with the Federal judge having specific areas where that judge must make a judgment regarding

the middle third as to whether this is truly a case national in scope and belongs in Federal court or whether it should remain in State court, offers a viable way of settling what has been a process that has been grossly criticized, and that is forum shopping, and I think with some considerable justification.

A lot of people have worked very hard on this bill. I am hopeful we will be able to pass it. I believe the bill in itself provides a remedy to what is wrong with the present class action law, and I support it with great pride. I urge my colleagues to support it as well.

I thank the Chair and yield the floor.